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OCTOBER TERM, 1900.

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S. D. HATFIELD ET ALS., APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

STATEMENT.

In October, 1898, the present appellee filed his bill in the circuit court for the district of West Virginia, at Charleston, against the appellants for the purpose of removing the cloud alleged to be constituted by certain instruments held by them upon a tract of land lying in part in said district, known as the Robert Morris 500,000-acre grant, patented to Robert Morris in 1795, and now claimed by the complainant

by title derived from said Morris. The defendants demurred to the bill June 8, 1899 (22), and the court, having held the same under consideration until May 16, 1900, overruled it (23), supporting that ruling by an opinion in writing (24), and the defendants declining to answer, a decree was entered June 2, 1900 (44), annulling the instruments under which the defendants claimed, and defendants appeal.

The principal facts alleged in the bill are as follows:

The portion of the tract in West Virginia is situate in the counties of Logan, Wyoming, Mingo, and McDowell, and when the constitution of the State was adopted in 1872, and for some time prior thereto, the heirs of one Maupertuis claimed 300,000 acres of the tract; Robert E. Randall, trustee, claimed 200,000 acres thereof and a mortgage on the Maupertuis interest, and one Anthony Lawson claimed an undivided three-fourths of the whole under a judicial sale thereof, the validity of which was disputed by Randall and the Maupertuis heirs, all of said interests being now claimed by the complainant.

There are about 300,000 acres of the tract in West Virginia, the rest lying in Virginia and Kentucky, but Lawson and his grantees were charged with taxes on the land books of Logan county—with State and other taxes—on 375,000 acres of said land from 1865 to 1878, and afterwards, to 1882, on 100,000, and paid the taxes; and Randall and the heirs of Maupertuis had their respective 200,000 acres and 300,000 acres entered on the land books of Wyoming county in 1869 and charged with taxes. The 200,000-acre interest was sold to the State, in Wyoming county, in 1871 for the taxes of 1870, and in 1877 the 300,000-acre interest was sold to the State for the taxes of 1874–'75, the prior taxes having

been paid. Under the provision of law for the sale of land purchased for the State at delinquent-tax sale a proceeding was instituted by the commissioner of school lands in the circuit court of Wyoming county, and Randall filed his petition therein, and upon payment of the back taxes thereon had a decree entered April 10, 1883 (13), declaring a redemption of the tract—both the Randall and the Maupertuis interests—up to and including 1883. The decree directed the clerk of the court to certify a copy thereof to the auditor of the State, and to certify, under direction of Randall or his counsel, copies to the assessors of the proper assessment districts for taxation.

The land was not re-entered on the land books within five years next ensuing, and in 1894 another suit was brought in the same court by the State to sell the land as forfeited for non-assessment of State taxes for the five years after 1883. The present appellee, King, filed his answer therein, and upon payment of the amount of taxes, interest, and costs fixed by the court a decree was entered September 30, 1897, declaring the land to be redeemed, &c., by said King so far as the title was in the State and subject to the claims that any person might have under the constitution of the State.

The defendants claim under two junior patents issued to Aly Hatfield in 1858, and three deeds to Joseph Hatfield issued by the commissioner of school lands of Logan county upon sales made within five years after 1883 under proceedings to sell the waste and unappropriated lands of the State, and the defendants claimed, as alleged in the bill, that the complainant's title had been forfeited by the constitution of the State, by the non-assessment of said land with taxes after 1883, and had vested, by virtue of the said constitution,

in the defendants' ancestor, as to the two patents, and that so far as the school land tracts were concerned the redemption by the complainant was unauthorized. The complainant averred that the provisions of the State constitution and statutes relied upon by the defendants are void as being in contravention of the Constitution of the United States.

The defendants demurred upon the ground, in substance, that the bill showed that the title to the land claimed by the complainant was forfeited by the constitution of the State and vested in Joseph Hatfield December 31, 1888, to the extent of the two junior grants of 330 and 450 acres then claimed by him, and was not legally redeemed nor legally redeemable as to the tracts claimed by defendants under the commissioner of school lands, because under the statute the suit in which the decree of redemption was entered should have been dismissed as to those tracts.

The court in overruling the demurrer held that the land claimed by the complainant, having been on the land books of Logan and Wyoming counties at the time of the adoption of the constitutional provision declaring it to be the duty of the owner of land to have it entered on the land books of the county in which it or a part of it is situated and charged with taxes thereon, and forfeiting tracts of 1,000 acres or more when for any five successive years after 1869 such tracts are not so charged with State taxes, did not come within the purview of the forfeiture provision; that, furthermore, the said Randall did all that could reasonably be required of him after his redemption of 1883 to have the land entered on the books, and for that reason also the land could not be forfeited, and that the provisions of the constitution of the State, sections 3 and 6 of article 13, undertaking to

forfeit the title of a land-owner to his land and vest that title in an adverse claimant, or in the State, without right of redemption and without provision for sale and return of excess of proceeds over taxes, interest, and costs, are in contravention of the Constitution of the United States, and that section 6 is an unlawful discrimination against the owners of tracts of 1,000 acres.

SPECIFICATION OF ERRORS.

First. The court erred in overruling the defendants' demurrer to the complainant's bill, because it appears from said bill that the tract of land claimed by complainant had, without legal justification or excuse, been omitted from the land books of the counties where the same was situated, and had not been charged thereon with State taxes for five successive years preceding the expiration of the last day of December, 1888, and by consequence thereof the title to said land was, by the force and operation of the constitution of West Virginia, forfeited and divested out of complainant's grantor and transferred to and vested in Joseph Hatfield, under whom the defendants claim, to the extent of the 330 acres and 450 acres then claimed by said Joseph Hatfield and mentioned in said patents, and the title so forfeited and transferred to and vested in said Joseph descended to and is now vested in the defendants, and was not restored to complainant by his alleged redemption, not being subject to redemption, and was not in any manner affected thereby or by the proceedings in which the same was had. The other lands claimed by these defendants having been "sold by the State in a proceeding for the sale of school lands," to wit, in

a sale of same as waste and unappropriated land, they likewise were not within the operation of complainant's redemption.

Second. The court erred in construing the provisions of said State constitution, viz., sections 3 and 6 of article 13, relied upon by the defendants, to be in contravention of the Constitution of the United States and to be void and inoperative, and in decreeing the annulment of the said patents and deeds under which defendants claim, and sustaining complainant's title to the lands therein described, and holding that the title thereto is not vested in the defendants, and enjoining these defendants from asserting title thereto against the complainant.

ARGUMENT.

The opinion of the learned judge is elaborate and is able, as all his opinions are, and if this were a question of first impression might not be easily overcome, but in my view it is, in effect, controlled by the decision of this court in the case of King *vs.* Mullins, 171 U. S., 404.

The facts that control this case are few. Robert E. Randall, under whom the appellee claims, owned the tract of land in controversy in 1883. It was redeemed by him that year from previous tax sale under which the title had vested in the State. It was his duty, under section 6, article 13, of the constitution of West Virginia, to have the land entered upon the land books of some county in which a part of it was situated. It is conceded by the bill that this was not done by him, nor by his successor in trust, Reed, within five years after the said redemption. This fact resulted in the

land being forfeited to the State at the expiration of that five years, unless there is some justification for his failure to enter the land, or that section does not apply to the land, or is invalid.

THE OMISSION NOT EXCUSABLE.

It is true that it was the duty of the various officers of the State referred to by the court in its opinion to enter the land upon the land books after the redemption, and that the statutes of the State themselves furnish adequate means, if complied with by the officers, of insuring and effecting a return of the land to the land books; but I do not concede that this provision in any way relieves the land-owner of the duty laid upon him by the constitution, unless he has made some affirmative attempt to have the land entered. I will not contend that he should go to the extent of resorting to mandamus, and it is even doubtful if such an action, which has in view a preventing of the State from acquiring title by forfeiture, could be maintained, under the provisions of the constitution of the State which prohibit the State from being made a defendant in any court; but it was within the power of Randall or his successor, within the five years, to call the attention of the clerk to the fact that the land was not entered, and it does not appear that anything of that sort was done by him.

CONSTITUTION NOT CONFINED TO LAND THEN OMITTED.

All of section 6 of article 13 seems to me to relate to the future and not to the then present, including the provision making it the duty of land-owners to have their land entered upon the land books. It is true that no specific direc-

tion is given by the constitution nor by any existing statute, nor does that seem to be needful. The land-owner is presumed to know what is the method of entering and charging lands and who are the officers entrusted with that duty, and the purpose of the constitution seems to be to require the land-owner not only to aid them in that respect by the knowledge that he, better than any one else, possesses with regard to his land, but to see to it that their duty is discharged as to the entering of his land upon the land books. We are not concerned either with the justice or necessity of this provision; it is sufficient if the law distinctly makes the requirement; and I am unable to read section 6 so as to get therefrom any meaning which justifies the construction placed upon it by the learned judge, to the effect that it only applies to land that is not on the land books at the time the constitution was adopted. It seems to me that that duty applies to all land-owners during all the time the constitution is in force.

THE VALIDITY OF THE FORFEITURE LAW.

This case comes before this court upon a somewhat different state of facts from the case of King *vs.* Mullins, but not, as it seems to me, under any different state of law. There has been no change in the law in the meantime, and the decree of redemption which the appellee procured from the circuit court of Wyoming county in 1897, which was after the action of ejectment against Mullins, does not, in my understanding, change his situation with regard to the land claimed by these appellants from what it would be if no such decree had been entered, for the decree contains a res-

ervation, and so does the law under which it was permitted, that saves the lands of these defendants from its operation.

This court, in King *vs.* Mullins, held that the constitution and statutes authorizing a judicial proceeding for the sale of school land making the former owner a party constituted due process of law, and that ruling has not been reversed nor retracted, and determined, as it seems to me, the whole controversy in this case against the appellee, for I am unable to see how it could be due process of law against the owner as to a part of the tract without being such as to the whole. He was deprived of the whole tract under his entire title at the same time he was deprived of any part, and the court did not hold the constitution and judicial proceedings constituted due process of law by reason of any particular result therefrom, but because it furnished an opportunity for the land-owner to be heard and to make such defense as the law and the facts permitted. I assume that this court, in reaching the conclusions it did, did not overlook the fact that the judicial proceeding authorized provided for the dismissal of the bill as to lands of the character of those claimed by these appellants without prosecuting any inquiry beyond the fact that the adverse claimant had paid the taxes for the requisite five years under junior patent, or that they had been sold in some proceeding for sale of school lands, and that such lands were not properly subject to redemption. These appellants were not parties to the suit of the State *vs.* King nor affected by the terms of the decree.

If the land of the appellee could be vested in the State by the operation of the constitution, there would seem to be no reason why the State should not limit the terms upon which it could be recovered, so as to except from such recovery such portions as the State may see fit to withhold; and if that be the case, it would seem to be immaterial whether such portions should remain vested in the State or should be transferred to some other person; they would not be more lost to the former owner in the one case than in the other. Process of law does not fail to be due process of law because the result happens to be unsatisfactory to some person. Upon this subject it is stated in Missouri Pacific R. R. *vs.* Humes, 115 U. S., 519:

"But, from the number of instances in which these words were invoked to set aside the legislation of the States, there is abundant evidence, as observed by Mr. Justice Miller, in the case referred to, 'that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment.' It seems, as he states, to be looked upon 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.'"

This whole question is settled, as I conceive, in King *vs.* Mullins, *supra*. I will call the attention of the court to the cases therein cited, and respectfully submit that upon the authority of King *vs.* Mullins, *ubi supra*, the decree in this case should be reversed.

HENRY C. FLESHER,
Counsel for Appellants.